Supreme Court, U.S.
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No. 97-1991

In The

Supreme Court of the United States

October Term, 1997

WAL-MART STORES, INC.,

Petitioner,

vs.

CLYDE N. GRIFFITH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under the Americans with Disabilities Act, is an employer entitled to summary judgment on the issue of the employee's ability to perform the essential functions of the job when the employer in documentary evidence, sworn deposition testimony, and its Petition for Writ, admits that the employee, who subsequently successfully applied for and received Social Security disability benefits, can do the essential functions of the job?

PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari inadvertently misidentifies the respondent as Clyde E. Griffith. Respondent's correct name is Clyde N. Griffith.

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INTRODUCTION

This is a unique case in which Wal-Mart admits that Mr. Griffith can do the essential functions of his Wal-Mart job. Petition, p 4. In spite of this admission, Wal-Mart argues that no reasonable jury can find that Griffith can do the essential functions of his job because Griffith has subsequently successfully applied for Social Security disability. The Sixth Circuit correctly held that where the defendant admits and the evidence shows that the employee can do the essential functions of the job the employer is not entitled to summary judgment that the employee cannot do the essential functions of the job.

STATEMENT OF THE CASE

I. Griffith Obtains Employment With Wal-Mart In 1990.

Mr. Griffith worked for Wal-Mart from October 3, 1990 until his termination on Monday, October 26, 1992. (Apx 69) He had a good work record, free from any major disciplinary matters.

Mr. Griffith initially started working for Wal-Mart in October 1990 as a sales associate in the sporting goods department. Because of a previously-existing back disability, Griffith was unable to do the sporting goods job. Therefore, around January 1991, he was transferred to the hardware department. Griffith worked in the hardware department from 1991 until September 1992. **Griffith was able to do the essential functions of the hardware department job.** (Apx 348) Although the hardware job

may not have been a statistically noticeable job in the economy, it was a job which Griffith could do. 42 USC 423(d)(2)(A)

In September/October 1992, Griffith was removed from the hardware department and transferred to the sporting goods department. The sporting goods department job was not compatible with Griffith's disability. (Ibid)

II. Wal-Mart Repeatedly Gives Mr. Griffith Satisfactory Appraisals.

Mr. Griffith received satisfactory appraisals because he could do the essential functions of his job. The October 1992 review indicated under "overall performance . . . **has a good attitude and works well with customers.**" (Apx 136) (Emphasis added) The October 1991 evaluation indicated "had **good initiative, . . . good worker, follows instructions very well, . . . has good work skills**, follows instruction with minimum follow-up, . . . **good efforts-**, tries to do his best . . . **very dependable** . . . has good knowledge of the department . . . **works very well with management and other associates.**" (Apx 131-134) (Emphasis added) The January 1991 evaluation indicated "productivity is pretty good . . . **attendance is very good-** . . . willing to help out wherever needed – very flexible . . . good customer assistance . . . friendly and helpful associate. **Very good with customers and associates.**" (Apx 124-125) (Emphasis added) The April 1991 evaluation stated "very good with customers." Regarding communication and shrinkage control, "does a good job."

"**Grif is very good with customers, [and] has a sense of pride.**" (Emphasis added) (Apx 129-130)

III. Wal-Mart Admits That Mr. Griffith Was Qualified For His Wal-Mart Employment

As indicated in Wal-Mart's February 1996 Memorandum [Apx 82], "[Griffith] was still capable of performing the essential functions of his sales associate position by obtaining assistance from another sales associate. Greer Depo pp 19 [Apx 762], 36 [Apx 764], 37 [Apx 765])"

Wal-Mart further stated:

> "There is no evidence to demonstrate Plaintiff Griffith was ever disqualified from performing the essential functions of a sales associate position at Wal-Mart. **Plaintiff Griffith has failed to show he became disqualified for any type of employment while at Wal-Mart.**" (Apx 90) (Emphasis in the original)

Wal-Mart's Petition admits Mr. Griffith "was able to perform the essential functions of [the hardware department] job." (Petition, p 4)

IV. Wal-Mart Fires Mr. Griffith In October, 1992

On September 21, 1992, Griffith's attorney wrote a letter to Store Manager Larry Greer indicating, in part, that:

> "As you are aware, Mr. Griffith is a handicapped individual. . . . If you would like to discuss this matter further, please give me a call at my office or write me at any time." (Apx 341-342)

Mr. Greer never responded to the letter. Rather, Mr. Greer fired Griffith approximately one month later, on October 26, 1992. (Apx 342)

Mr. Griffith was not at work during the week of October 19, 1992. Griffith's assistant store manager told Griffith that he did not have to return to work until Monday, October 26, 1992. (Apx 348) When Griffith appeared for work on Monday, October 26, 1992, he was discharged by Wal-Mart purportedly for not returning to work on the prior Saturday.

V. Thereafter, No Employer Would Hire Mr. Griffith Because Of His "Condition And Restrictions."

As indicated by Griffith in his Social Security disability application:

> "Question 3b: Explain how your condition keeps you from working.
>
> Answer: **No employer will hire me because of my condition and restrictions.**" (Apx 551)

VI. Mr. Griffith Was Qualified For His Wal-Mart Employment

Wal-Mart had an opportunity, from 1990 to 1992, to constantly evaluate Griffith's work performance. Wal-Mart consistently evaluated plaintiff's work performance as, at least, satisfactory.

Wal-Mart's consistently good evaluations of Mr. Griffith's job performance and Store Manager Greer's testimony confirm that Griffith was performing his job

" 'at a level which met his employer's legitimate expectations.' " *McDonald v. Union Camp Corp*, 898 F2d 1155, 1160 (6th Cir 1990). See generally, Petition for Writ, p 4.

VII. Mr. Griffith Applies For Disability Benefits From The Social Security Administration In A Nonadversarial Proceeding.

Mr. Griffith applied for Social Security Administration benefits in May 1993. (Apx 550) Without a hearing and in a nonadversarial proceeding, a Social Security administrative law judge determined in July 1994 that Griffith was entitled to benefits. (Apx 567-570)

VIII. District Court Grants Summary Judgment To Wal-Mart And Sixth Circuit Reverses

The United States District Court for the Eastern District of Kentucky granted summary judgment to Wal-Mart on Griffith's claims under the ADA. The district court held that Griffith was precluded from showing that he was capable of performing the essential functions of the job because he had represented that he was totally disabled in order to obtain disability benefits. 930 F Supp 1167 (ED Ky 1996)

On appeal, the Sixth Circuit gave several reasons why judicial estoppel should not apply.

> "The precise question of whether the applicant could have worked with a reasonable accommodation during the relevant period is not asked in a Social Security context because . . . it would not necessarily bar receipt of those benefits." 135 F3d 376, 382 (6th Cir 1998)

Statements made in SSA applications "are open to interpretation," *Id*, and should be considered in context, the Sixth Circuit said. Because applicants are asked to check off boxes without comment or fill in blanks with little room for elaboration, "the employee may not have a fair opportunity to accurately explain the details of the employee's medical condition and his ability or inability to work for purposes of the ADA." *Id.*

The court added that applying judicial estoppel, an equitable doctrine,

> "under the circumstances presented here would be inappropriate given that the truth-seeking function of the court would be supplanted by an agency administrative decision rendered without an evidentiary hearing. . . . We believe these prior statements should not be the subject of judicial estoppel or a theory of 'super admissions,' but rather should be analyzed under traditional summary judgment principles." *Id* at 382-383.

The court concluded that summary judgment was improperly granted to Wal-Mart because Griffith raised a genuine issue of material fact as to whether he was capable of performing the essential functions of his job with reasonable accommodation. The company admitted that Griffith was able to perform his job in the hardware department and that it was able to accommodate his physical restrictions, the court pointed out. Griffith argued that his seemingly inconsistent statements were made ten months after he was fired, when his condition had worsened.

REASONS FOR DENYING THE WRIT

The Courts of Appeal which have considered the issue before the Court unanimously agree that a claimant's sworn assertions made to the Social Security Administration ("SSA") are relevant in assessing whether the claimant is a qualified individual with a disability under the Americans with Disabilities Act ("ADA"). Regardless of whether the court applies judicial estoppel or simply uses a traditional summary judgment analysis, the Circuits uniformly make their decisions based upon the claimant's assertions **in light of all of the available evidence.** Thus, review by this Court of the present case will not eradicate the need in the future for the case-by-case factual analysis employed to resolve this and similar claims.

I. The Circuit Split Is More Form Than Substance

The Third Circuit initially held that a plaintiff who certifies total disability on an application for benefits is judicially estopped from bringing an ADA claim. *McNemar v. Disney Store, Inc*, 91 F3d 610 (3rd Cir 1996), *cert denied*, ___ US ___, 117 SCt 958, 136 LEd2d 845 (1997). In *McNemar*, the plaintiff was terminated from his position as assistant manager for theft after divulging that he was HIV positive. McNemar then applied for SSD benefits and stated on the standardized application form that he was totally disabled and unable to work as of five weeks prior to his discharge. He made similar statements on applications for forbearance of student loan payments and state disability benefits. Shortly thereafter, McNemar brought disability claims against Disney under the ADA

and state law. The district court dismissed the disability claims on judicial estoppel grounds. The Third Circuit affirmed. According to the Third Circuit "[c]learly McNemar has asserted inconsistent positions regarding his ability to work." *Id* at 618. He certified in his applications for benefits that he was totally and permanently disabled and unable to work and earn money; but in his disability claims he stated he could perform the essential functions of his job. *Id*. Accordingly, the court held that the district court properly applied the doctrine of judicial estoppel.

In *Krouse v. American Sterilizer Co*, 126 F3d 494 (3rd Cir 1997), Judge Becker, writing for a panel of the Third Circuit, responded to the "considerable criticism" of the *McNemar* decision and indicated that *McNemar* articulated a relatively fact-specific holding. *Id* at 502 n3 and 503 n5. The district court in *Krouse* granted summary judgment on the ground that the plaintiff was judicially estopped from establishing the qualifications element of his ADA claim. Although the Third Circuit affirmed on different grounds, the court stated in a footnote that "district courts in this circuit are misapplying *McNemar* without first considering the unique facts of that case." *Id* at 503 n5. The court instructed that "[c]ourts should not assume that *McNemar* always bars an individual's ADA claims merely because prior representations or determinations of disability exist in the record." *Id*. Another footnote stated that "Judge Becker is persuaded . . . that *McNemar* was wrongly decided, and believes that the court should reconsider it at its first opportunity." *Id* at 503 n4.

Taking into consideration the *Krouse* court's discussion of *McNemar*, it appears that no court of appeals has adopted the position that a plaintiff who has claimed total disability on a benefits application is **per se** estopped from claiming he or she could work with reasonable accommodations under the ADA. **This is especially the case where the employer has admitted that the employee can do the essential functions of the job.** Petition for Writ, p 4.

The District of Columbia Circuit has held that representations on an application for disability benefits are merely one piece of evidence that an ADA plaintiff is not "qualified," rather than an absolute bar. See *Swanks v. Washington Metro Area Transit Authority*, 116 F3d 582 (DC Cir 1997). In *Swanks*, the plaintiff, who suffered from spinal bifida, sought and received SSD benefits after he was fired from his job as a police officer with the Transit Authority. Swanks then filed an ADA claim alleging that the Authority refused to accommodate his disability and then fired him because of it. The district court entered summary judgment for the Authority because Swanks' "disability determination renders [him] unqualified for the position which he held either as it was or with a reasonable accommodation . . . ." *Id* at 584. The court of appeals reversed.

The court of appeals began by outlining the SSD application process. *Id* at 584-85. Under the Social Security Act, an individual is entitled to disability benefits if the claimant's physical or mental impairment or impairments are of such severity that the claimant is not only unable to do the claimant's previous work but cannot, considering his age, education, and work experience,

engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him. 42 USC 423(d)(2)(A). **The Social Security Act does not address the effect of a reasonable accommodation on a claimant's disability status.** In administering the Act, the SSA has developed a five-step procedure for evaluation of disability claims. 20 CFR 404.1520. The five steps are as follows:

> I. The SSA ascertains whether the claimant is currently engaged in "substantial gainful activity." If so, the agency denies the application. If not, it proceeds to step two.
>
> II. The agency determines whether the claimant has a "severe" impairment. If not, the application is denied. If so, the agency proceeds to step three.
>
> III. The agency checks whether the impairment is listed as presumptively disabling in the regulations. If the claimant's condition is listed, the agency awards with no further inquiry. If the condition is not listed, the agency proceeds to step four.
>
> IV. The agency determines whether the claimant is able to perform his past work. If so, benefits are denied. If not, the agency proceeds to the final step.
>
> V. Considering the claimant's age, educational experience, past work experience, and residual functional capacity, the agency determines whether the claimant can do "other work," i.e., jobs "that exist in significant number in the national economy." 20 CFR 1560(c). If so, the

> agency denies the application. If not, the agency awards benefits. In fact, under the fifth step, for a claimant who has shown that he or she cannot perform past relevant work, the SSA will find that claimant disabled for Social Security benefits even if the claimant can perform the full range of unskilled sedentary and light work, as defined under 20 CFR 404.1567 (a) and (b), if the claimant is over 55 years old and has less than a high school education and has done unskilled work. See Rules 201.01 and 202.01, Appendix 2, 20 CFR Part 404. In addition, under 20 CFR 404.1592(a), a beneficiary of SSD benefits may engage in a trial work period for up to nine months, to see if the person is capable of working, while still receiving full Social Security disability benefits.

The SSA has issued an Information Memorandum explicitly stating that, for the purpose of the fifth step assessment, "[w]hether or how an employer might be willing (or required) to alter job duties to suit the limitations of a specific individual would not be relevant." Daniel L. Skoler, Assoc Comm'r, SSA, Disabilities Act Info Mem at 3, (June 2, 1993) (No SG3P2). The Memorandum also stresses that "[h]ypothetical inquiries about whether an employer would or could make accommodations that would allow return to a prior job would not be appropriate." *Id.*

The *Swanks* court pointed out that "[n]owhere in this five-step process does the Social Security Administration take account of the possible effect of reasonable accommodation on a claimant's ability to work." *Swanks*, 116 F3d at 585. A claimant can be found disabled at the third step if she has a "listed" impairment, with no inquiry into

her actual ability to work. In addition, a claimant can be deemed eligible for benefits at the fifth step, where the inquiry focuses on the general availability of particular types of work and **not on whether a reasonable accommodation would enable a claimant to work**. In short, an individual can meet the requirements for SSD eligibility and still be a "qualified individual with a disability" under the ADA. The *Swanks* court recognized that there is no inherent inconsistency. Both the SSA and the EEOC have taken the position that there is no inherent inconsistency. See *Swanks, id* at 586.

The *Swanks* court declined to apply estoppel in all such cases in favor of a case-by-case inquiry that examines the specific statements a disability discrimination plaintiff makes in connection with applications for disability benefits.

In *Cleveland v. Policy Mgmt Sys Corp*, 120 F3d 513 (5th Cir 1997), *petition for cert filed*, 66 USLW 3435 (US Dec 15, 1997) (No 97-1008) the Fifth Circuit held that there is a "**rebuttable** presumption" that an applicant for or recipient of SSD benefits is not a "qualified individual with a disability." *Id* at 518. (Emphasis added) The court stopped short of holding that all SSD applications should create an estoppel. "It is at least theoretically conceivable that under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive . . . " *Id* at 517. In *Dush v. Appleton Elec Co*, 124 F3d 957 (8th Cir 1997), the Eighth Circuit ruled that an ADA plaintiff who had characterized herself as "totally disabled" in a previous workers' compensation proceeding failed to present evidence showing she was a "qualified individual with a disability." The court declined to

hold that judicial estoppel precluded all such plaintiffs from proceeding with an ADA claim.

Still other courts of appeals presented with this question have limited themselves to the facts of their cases, without articulating any broad rules. See *D'Aprile v. Fleet Servs Corp*, 92 F3d 1, 4, (1st Cir 1996) (ADA plaintiff's statements on application for disability benefits "may not have constituted [a] broad admission of incapacity," so the ADA claim was not automatically barred); *Weigel v. Target Stores*, 122 F3d 461, 466-67 (7th Cir 1997) (explaining that an SSA total disability determination, while relevant, is not dispositive of the issue of an ADA claimant's status as a "qualified individual with a disability"). See EEOC Enforcement Guide entitled "Effect of Representations Made in Applications for Disability Benefits on the Determination of Whether a Person is a 'Qualified Individual With a Disability' Under the Americans with Disabilities Act of 1990 (ADA)," reprinted in BNA's Americans With Disabilities Act Manual No 62 at 70:1251; http://www.eeoc.gov/docs/qidreps.txt.

II. The Sixth Circuit's Holding Is Reasonable And Appropriate

The Sixth Circuit *Griffith* decision is completely consistent with the holdings of its sister circuits that a certification of total disability on an SSD benefits application is not inherently inconsistent with being a "qualified individual with a disability" under the ADA. See *Talavera v. School Board of Palm Beach Cty*, 129 F3d 1214 (11th Cir 1997). This is especially the case where the employer, as Wal-Mart did in this case, has admitted that the employee

can do the essential functions of the job. Petition, p 4. **Indeed, it is difficult to understand how, in a reasoned legal environment, a corporation can admit, as Wal-Mart has repeatedly done in this case, that an employee can do the essential functions of the job and yet try to argue with a straight face that it is entitled to summary judgment on the purported basis that there is no genuine issue of material fact that the employee can do the essential functions of the job.**

The *Griffith* decision is completely consistent with and mandated by Sixth Circuit law. The issue of judicial estoppel had already been decided in Mr. Griffith's favor. In *Blanton v. Inco Alloys Int'l, Inc*, 123 F3d 916, 917 (6th Cir 1997), the Sixth Circuit held:

> "We agree with the DC Circuit's opinion in *Swanks v. Washington Metropolitan Area Transit Authority*, 116 F3d 582 (DC Cir 1997), that holds that the receipt of disability benefits does not preclude subsequent ADA relief and rejects the doctrine of judicial estoppel, but does allow the consideration of prior sworn statements by the parties as a material factor."

Judicial estoppel does not apply where the prior proceeding was an uncontested nonadversarial administrative proceeding. *Edwards v. Aetna Life Ins Co*, 690 F2d 595, 598 (6th Cir 1982). Social Security administrative proceedings are not adversarial. *Sullivan v. Hudson*, 490 US 877, 891, 109 SCt 2248, 2257, 104 LEd2d 941 (1989); *Willis v. Sullivan*, 931 F2d 390, 400 (6th Cir 1991).

The issue in the *Griffith* case is whether there is a genuine issue of material fact that Mr. Griffith could do his Wal-Mart hardware department job. Wal-Mart says he

could. Larry Greer was Mr. Griffith's Store Manager. Store Manager Greer confirms that:

> "Q. Were there any problems with Mr. Griffith's job performance in the Hardware Department?
>
> A. No, sir." (Apx 763)

Store Manager Greer further testified that:

> "Q. Were there ever any complaints of Mr. Griffith while he worked in the Hardware Department?
>
> A. Not that I can remember at this point, no." (Apx 768)

* * *

> **"A. He could do the Hardware job as I understand it, the way we modified it, he had no problem doing it the way we had modified the job."** (Apx 768) (Emphasis added)
>
> "Q. So Mr. Griffith always gave what you were looking for?
>
> A. Yes, sir.
>
> Q. You never received any complaints about Mr. Griffith's job performance?
>
> A. I personally did not, nō, sir.
>
> Q. Or heard of any complaints?
>
> A. About his job performance?
>
> Q. Yes, sir.
>
> A. No, sir." (Apx 759, District Manager Jim Coln)

> **"He did the things that he was supposed to be doing in the Hardware Department."** (Apx

849; Asst. Store Manager Steve Kissabeth) (Emphasis added)

In September 1992, Wal-Mart transferred Mr. Griffith from the hardware department to the sporting goods department. Wal-Mart has given inconsistent reasons for this transfer. Wal-Mart told the EEOC on March 15, 1993:

> "Charging Party moved to Sporting Goods in October [1992] to help during the hunting/fishing seasons . . . ." (Apx 355)

Wal-Mart's district manager Jim Coln testified:

> "Q. So basically Mr. Greer told you that Mr. Griffith was being transferred to Sporting Goods, department nine, to accommodate Mr. Griffith because of the lifting restrictions?
>
> A. Yes. Mr. Griffith had doctor's restrictions on what he could lift." (Apx 752)

The "inconsistency" of these statements and reasons are evidence of discrimination. *Tinker v. Sears, Roebuck & Co*, 127 F3d 519, 523 (6th Cir 1997), *Edwards v. US Postal Service*, 909 F2d 320, 324 (8th Cir 1990), *Schmitz v. St. Regis Paper Co*, 811 F2d 131, 132-133 (2nd Cir 1987).

After the discriminatory transfer to the sporting goods department, Mr. Griffith's attorney protested this disability discrimination to Store Manager Larry Greer on September 21, 1992. (Apx 148-149) Hardly a month later, Wal-Mart fired Mr. Griffith for pretextual reasons. A person's status as a "qualified individual with a disability" is not relevant in assessing the person's claim for retaliation under the ADA. *Krouse v. American Sterilizer Co*, 126 F3d 494 (DC Cir 1997); *Brewer v. Petroleum Suppliers*, 946 F Supp 926 (ND Al 1996); 42 USC 12203(a).

After the discharge, Mr. Griffith attempted to get vocational training. (Apx 538)

When Mr. Griffith finally applied for Social Security disability the Disability Report indicated:

"DISABILITY REPORT:

Explain how your condition now keeps you from working?

No employer will hire me because of my condition and restrictions." (Apx 551)

The Remarks Section indicated:

"Due to my back condition, I would like to claim benefits until I finish my education at Northern Kentucky University. With all of my restrictions, no employer will hire me. I have apply at least thirty employers and somebody else got hire, who was in excellent health and have no limitation." (Apx 556)

The Social Security Administration indicated on August 30, 1993:

"The claimant said his problems with depression began in September of 1988 when his mother died. He said his condition has worsened in the past 3-4 months because he can't find a job. He said people have turned him down because of his lower back injury. He said he has applied for jobs he felt he could do then never heard anything or he has been told he would be a liability to them." (Apx 571)

Based on Wal-Mart's admissions that Mr. Griffith could do the hardware department job and Mr. Griffith's statements in his Social Security documents that he was

looking for work and was unable to work because employers turned him down, a reasonable jury could find that Mr. Griffith was qualified for his hardware department job.

A reasonable jury could find that Mr. Griffith was qualified to do the essential functions of his Wal-Mart job for the simple reason that Wal-Mart admits that Mr. Griffith could do the job. The Sixth Circuit did nothing other than comply with Civil Rule 56 in holding that there were genuine issues of material fact in light of Wal-Mart's consistent admissions that Mr. Griffith could do the essential functions of his Wal-Mart job.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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